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No. 95-2034

In the Supreme Court of the United States

OCTOBER TERM, 1996

KARL A. SCHLEDWITZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the Tenth Circuit, prosecutors, pursuant to their *Brady* obligations, are required to disclose any "obviously exculpatory" evidence, regardless "of the defendant's knowledge." *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) (internal quotation marks and citation omitted). As the Solicitor General is constrained to admit (Opp. 12-13), the Tenth Circuit has flatly, and repeatedly (see *id.* at 14 n.5), held that "[t]he only relevant inquiry" under *Brady* "is whether the information [is] 'exculpatory.'" 54 F.3d at 1517. If it is, then prosecutors have a duty to turn it over — even if, in their view, the defendant should be able to find the exculpatory evidence on his own.

By contrast, the Sixth Circuit, joined by several other circuits (see Pet. 10-11), has held that prosecutors have no duty under *Brady* to disclose exculpatory evidence "where the evidence is available to [the] defendant from another source." *United States* v. *Clark*, 928 F.2d 733, 738 (6th Cir.), cert. denied, 502 U.S. 846, 885 (1991). Because of the Sixth Circuit's "due diligence" exception to the *Brady* obligation, the prosecutors in this case were able to defend their failure to produce the Jake Butcher interview report on the ground that "the prosecution need not disclose allegedly exculpatory statements when they are readily available to the diligent defender." Gov't C.A. Br. 18-19. And the court below was able to reject petitioner's *Brady* claim on the ground that — notwithstanding the government's failure to produce the report — petitioner "should have been aware of Butcher's opinions." Pet. App. 10a.

The Solicitor General nevertheless insists (Opp. 9) that "no circuit conflict exists" on this critical issue of criminal procedure. But that is only because the Solicitor General fundamentally misapprehends, or simply misstates, the nature of the conflict. Perhaps recognizing the improbability of satisfying this Court that there is no conflict, the Solicitor General alteratively contends (Opp. 10) that "the instant case would be an inappropriate vehicle for resolving" the conflict.

But that is only because the government misreads the decision below and ignores the well-entrenched Sixth Circuit case law that the court below faithfully applied. For the reasons stated in the petition, further review is clearly warranted to consider this important issue of criminal procedure and to reject the "due diligence" exception to *Brady* that was invoked to deny petitioner's claim.

1. Had this case been prosecuted by the United States Attorney in Denver, Topeka, Salt Lake City, Oklahoma City, Albuquerque, or anywhere else in the Tenth Circuit, the government would have been obligated to turn over the Jake Butcher interview report. Unfortunately for petitioner, however, he was indicted in the Sixth Circuit — where, as in the Fourth, Fifth, and Eleventh Circuits (see Pet. 10-11), there is no duty to disclose exculpatory evidence that the defendant, in the exercise of due diligence, should be able to find for himself.

The Solicitor General grudgingly admits (Opp. 13) that "[t]he Tenth Circuit's approach differs from that adopted by other courts of appeals." He insists, however, that the conflict is ultimately immaterial. In the Solicitor General's view (*ibid.*), even the Tenth Circuit agrees that a defendant's exercise of due diligence "is relevant to the question whether the withheld evidence is 'material,' and thus whether a *Brady* violation has occurred." Thus, the Solicitor General maintains (Opp. 14), the Tenth Circuit's contrary "approach" to the disclosure obligation "will have no practical effect on the ultimate resolution of a defendant's *Brady* claim." He is wrong for two independent reasons.

First, he misreads the Tenth Circuit's opinion. While the court did state in *Banks* that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation" (54 F.3d at 1517), its explication of the point shows that it was speaking of *actual knowledge* of the exculpatory evidence, not merely *the failure to exercise due*

diligence, as affecting the materiality of the non-disclosure. As the court put the matter (*ibid.*; emphasis added): "Obviously, if the defense *already has a particular piece of evidence*, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." The proposition that a defendant cannot obtain relief under *Brady* for the failure to disclose evidence that he already possesses seems to us self-evidently correct. But it simply does not support the government's claim that the Tenth Circuit would find immaterial a failure to disclose exculpatory evidence merely because the defendant could have found the evidence on his own.

Indeed, the outcome of *Banks* confirms that the Tenth Circuit resolves *Brady* issues very differently from the Sixth Circuit. In *Banks*, the court granted habeas relief because the prosecutors failed to advise defense counsel that another suspect had previously been charged with the crime on which the defendant was ultimately convicted. It so held, even though the same defense lawyer had himself represented the prior suspect. Surely the Sixth Circuit, faced with those facts, would have held — as the panel did here — that the defense "should have been aware" (Pet. App. 10a) of the prior arrest, and that habeas relief was therefore unwarranted. The Tenth Circuit's contrary conclusion in *Banks* suggests that that circuit's resolution of *Brady* claims is now, and will (if unreviewed) continue to be, quite different.

But even if the Solicitor General's reading of *Banks* were sound, so that a failure to exercise due diligence would defeat a *Brady*-based new trial claim in the Tenth Circuit as well as in the Sixth and its compatriots, that does not eliminate the conflict or vitiate its practical importance. It would still be true that in the Tenth Circuit (but not in the Sixth, Fourth, Fifth, and Eleventh Circuits), *the government would have a duty to disclose the exculpatory material regardless of due diligence, and thus the practice of criminal law in the Tenth Circuit is fundamentally different from the practice elsewhere.*

The Solicitor General does not, and cannot, dispute that on this crucial issue of criminal practice the circuits are starkly divided.

Nor is it true, as the Solicitor suggests in a footnote (Opp. 13 n.4), that perhaps the Tenth Circuit's rejection of the "due diligence" exception is merely "dictum." True, the court of appeals in *Banks* went on to "accept" the trial court's finding that defense counsel "neither knew nor should have known about the withheld evidence." But, at most, that renders the "due diligence" rejection an alternative holding. And as the Solicitor General himself recognizes (Opp. 14 n.5), subsequent case law in the Tenth Circuit has followed the *Banks* court's rejection of the due diligence exception. In *Hatch* v. *Oklahoma*, 58 F.3d 1447 (10th Cir. 1995), cert. denied, 116 S. Ct. 1881 (1996), the court of appeals, following *Banks* (58 F.3d at 1470 n.17), refused, in assessing whether a prosecutor had failed to disclose exculpatory evidence, to "rely on the fact that the defense apparently was aware" of the undisclosed evidence. See also *United States* v. *McVeigh*, 923 F. Supp. 1310, 1313-1314 (D. Colo. 1996) (following *Banks* and holding that prosecutors have a duty to disclose "exculpatory evidence").

2. Recognizing, perhaps, that there really *is* a conflict on an issue of great practical importance, the Solicitor quickly adds (Br. 14) that "the Tenth Circuit's analysis appears contrary to this Court's precedents." That, of course, is not a reason to deny certiorari when the precedents the Tenth Circuit has allegedly misunderstood antedated its conflict-creating decision. In any event, it is the Sixth Circuit, not the Tenth Circuit, that has misapplied this Court's *Brady* decisions. As we stated in the petition (at 17-18) — and as the Solicitor General makes no effort to dispute — in *United States* v. *Agurs*, 427 U.S. 97 (1976), the government made the very "due diligence" argument that was pressed successfully by the prosecutors in the present case. This Court pointedly *refused*, however, to adopt that standard. See *id.*

at 106, 111. And in its subsequent *Brady* cases, the Court has never suggested, even in passing, that a prosecutor is free to withhold exculpatory evidence that he or she believes to be discoverable by the defense from other sources. To the contrary, as we stated in the petition (at 18-19), the Court's recent *Brady* cases undercut the contention that there is a due diligence exception to the disclosure obligation in *Brady*.[1]

3. Perhaps because it wishes to "keep its powder dry," or perhaps because it is not prepared to defend the Sixth Circuit's rule in this Court, the government never addresses our challenge to the merits of the due diligence exception to *Brady*. As we have explained (Pet. 13-16), the due diligence exception constricts the government's *Brady* obligations by encouraging prosecutors to withhold exculpatory evidence in the hopes that a reviewing court will later conclude that the defendant could have found the evidence for himself. Moreover, a prosecutor who withholds material in the face of a specific request (as here) thereby *encourages the defense to believe it does not exist*. See *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.). The due diligence exception, in short, turns a fundamental rule of due process into an advocate's game of "gotcha." Prosecutors, no less than any other advocate, "simply cannot be asked to maintain the requisite neutrality with regard to their own investiga-

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[1] The government cites (Opp. 14) *Agurs* and the more recent decision in *Kyles* v. *Whitley*, 115 S. Ct. 1555 (1995), for the proposition that a prosecutor's failure to disclose exculpatory evidence might not violate the Constitution if the evidence is not material. But that hardly means, as the government suggests (Opp. 14), that the Tenth Circuit's decision is at odds with this Court's rulings. Nothing in this Court's cases suggests that evidence is "immaterial," and thus free from constitutional scrutiny, merely because the defendant could have found the exculpatory evidence on his own.

tions." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450 (1971).

The Solicitor General offers not a word in defense of this extraordinary exception to *Brady*. Nor does he dispute that the question presented in this case is important. He could hardly have done so in any event. As amicus curiae National Association of Criminal Defense Lawyers (NACDL) points out (Br. 2), there is already a highly "restricted scope of federal criminal discovery" and even more limited discovery in many states. See *Degen* v. *United States*, 116 S. Ct. 1777, 1781 (1996) ("[a] criminal defendant is entitled to rather limited discovery"); *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561 (1977). Indeed, the NACDL observes, in some states "there is virtually no criminal discovery" at all. In those states, but elsewhere as well, the rule in *Brady* can afford criminal defendants some vitally important insight into the strengths or weaknesses of the case against them. As the NACDL correctly adds (Br. 2), "[t]he 'due diligence' exception to *Brady* adopted by the Sixth Circuit and some other courts seriously undermines the effectiveness of the *Brady* rule and is plainly at odds with its purpose."

Neither does the Solicitor General dispute that the question presented is a recurring one in the criminal justice system. Again, he could hardly have done so. As we stated in the petition (at 19), the scope of the government's *Brady* obligations is at issue in virtually every criminal trial in this country. In at least four circuits, but not in the Tenth Circuit, prosecutors are free to withhold exculpatory evidence whenever, in their estimation, the defense can find it on its own. One can hardly imagine a more basic issue for the day-to-day conduct of criminal litigation.

4. Fresh out of options, the Solicitor General contends (Opp. 15) that "[e]ven if a circuit conflict did exist, this case

would be an inappropriate vehicle for its resolution."[2] In his view (*ibid.*), "the court of appeals' decision in the instant case does not rest solely on a determination that petitioner's trial counsel failed to exercise due diligence in acquiring evidence about Jake Butcher's exculpatory statements. Rather, the court also indicated that petitioner was in fact aware of Butcher's view that petitioner's banking activities were not illegal."

This contention is flawed at every turn. First, the government has completely misread the court's opinion. The government relies (Opp. 15-16) on a portion of the opinion in which the court of appeals surmised that petitioner "had to be aware of Butcher's opinion." But that manifestly is *not* a way of saying that petitioner was, *in fact*, aware of Butcher's opinions, but only that petitioner *ought* to have had such knowledge. As if the point were not already sufficiently clear, the court of appeals went on to state — in language that supports no competing interpretation — that "[s]ince [petitioner] *should have been aware* of Butcher's opinions, the failure to provide [petitioner] with the FBI 302 report is not a denial

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[2] The government also intimates (Opp. 3 n.2), without quite saying so, that perhaps this case should not be granted because the exculpatory statements at issue bear on only one of the three counts of which defendant was convicted. But that is simply not so. As we explained in the petition (at 2), and as the government fails to refute, the indictment in this case charged a scheme to defraud that covered *each* of the counts at issue. As part of that alleged scheme, petitioner was said to have defrauded "various Butcher-controlled banks" by taking out loans in his own name, while at the same time using the proceeds "for the personal and political benefit of the Butchers." C.A. App. 15. The FBI 302 withheld by the government in this case bore critically on those allegations, and thus applied to each of the three counts of which petitioner was convicted.

of a fair trial with regard to Butcher's substantive comments." Pet. App. 10a-11a (emphasis added).[3]

The government also overlooks the fact that the court of appeals' decision in this case applied settled Sixth Circuit case law adopting the due diligence exception. The court cited (Pet. App. 11a) *United States* v. *Todd*, 920 F.2d 399 (6th Cir. 1990), in which the Sixth Circuit had held that the government had no duty to disclose interview reports of key co-conspirators, despite a specific pretrial request, where the defendant had access to the witnesses and knew that they could "possibly" exculpate him. *Id.* at 404-405. In light of that citation, there is no reason not to take the Sixth Circuit at its word — *i.e.*, that petitioner lost his new trial motion because he "should have been aware of Butcher's opinions" even without disclosure by the prosecutors. Pet. App. 10a-11a.

In all events, in light of the importance of the issue, it makes no sense to await a more "appropriate vehicle" for resolving the question presented. *Brady* issues, it bears repeating, are the daily fare of criminal litigation. Across the country, prosecutors — like the Solicitor General in this case (see Br. 14) — insist that it is "contrary to this Court's precedents" to require the government to turn over exculpato-

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[3] It is inconceivable that the court of appeals could have found, as a matter of fact, that petitioner had actual knowledge of the opinions Butcher provided to the FBI during his 1985 interview. As we noted in the petition (at 6 n.1), Butcher submitted an affidavit to the trial court stating that, by 1992, he himself no longer had any recollection of what he had told the FBI during his interview seven years earlier. To the contrary, Butcher added, he "had spent the last seven years trying to erase the memory of the events" of this case. C.A. App. 355-356. Thus, Butcher could not, and did not, provide petitioner's counsel with any indication of opinions he had given to the FBI. Indeed, he did not even tell defense counsel that an FBI interview had taken place. *Ibid.*

ry material that the defense can find on its own. That is exactly what the prosecutors in this case told the Sixth Circuit (Gov't C.A. Br. 18-19). But it is just plain wrong, and this Court should grant review and say so.

5. Finally, the government fails to refute our showing (Pet. 14-16) that the court of appeals' due diligence rule had devastating consequences for the disposition of petitioner's new trial motion. For example, we pointed out (Pet. 14) that the court below never considered the exculpatory nature of the FBI 302 or the importance of the evidence it contained. Remarkably, the Solicitor General insists (Opp. 16) that the court of appeals simply "took those points for granted" in its analysis. We profess no comparable ability to read the panel's mind. It suffices to note that, if the court of appeals *did* take those points for granted, it did so *sub silentio*.

We also pointed out (Pet. 15) that the court of appeals failed to consider the fact that, had petitioner been given the FBI 302, he could have called Butcher (a highly recalcitrant witness) to the stand, secure in the knowledge that the statement could be used to bolster (or impeach) Butcher's testimony. The government claims (Opp. 17) that this argument should be overlooked because it was never called to the panel's attention. But the issue must evidently have been sufficiently plain to enable Chief Judge Merritt to rely at length on that very point in his dissent from the denial of rehearing en banc. Pet. App. 39a.

6. The sum of the matter is this: The court of appeals rejected petitioner's new trial motion without regard to the exculpatory nature of the Butcher interview report, and without regard to its potential impact on the outcome of the trial. By the panel's lights, it was sufficient that petitioner should have, through the exercise of due diligence, found out about the statements on his own.

That turns the rule of *Brady* on its head. Further review is warranted to resolve the circuit conflict on this important and recurring issue of criminal trial practice.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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